

1 Steven P. Krafchick
2 Washington State Bar No. 13542
3 Admitted Pro Hac Vice
4 KRAFCHICK LAW FIRM
5 2701 1st Ave., Suite 340
6 Seattle, WA 98121
7 (206) 374-7370 (Telephone)
8 (206) 374-7377 (Facsimile)
9 klf@krafchick.com

10 Attorneys for Plaintiff
11 ANITA B. CARR

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 AT SAN FRANCISCO

15 ANITA B. CARR,

16 Plaintiff.

17 v.

18 LIBERTY LIFE ASSURANCE COMPANY, a
19 Massachusetts Corporation, and PROVIDIAN
20 BANCORP SERVICES, a domestic
21 corporation,

22 Defendants.

NO. C 05-3190 THE

PLAINTIFF'S REPLY IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL
DEFENDANT LIBERTY LIFE ASSURANCE
COMPANY TO ATTEND BINDING
ARBITRATION

Date: April 17, 2006

Time: 10 A.M.

Place: Courtroom 12

Judge: Honorable T.E. Henderson

23 The Court is respectfully asked to recognize several points:

- 24 1. The U.S. Supreme Court recognizes that federal law strongly favors settling statutory
25 disputes by arbitration if not directly precluded by Congress.

26 PLAINTIFF'S REPLY SUPPORTING
27 MOTION TO COMPEL ARBITRATION - 1

KRAFCHICK LAW FIRM
2701 First Avenue, Suite 340
Seattle, Washington 98121
(206) 374-7370 Fax (206) 374-7377

2. The 9th Circuit recognizes that non-signatories can be bound under arbitration agreements if they are agents of a signatory.

3. Liberty freely **admits** it is Providian's agent for all purposes herein by asserting it is Liberty's agent under the severance agreement.

I. THE SUPREME COURT AND THE 9TH CIRCUIT APPROVE OF RESOLVING DISPUTES ARISING UNDER FEDERAL STATUTES INCLUDING ERISA BY BINDING ARBITRATION

As the 9th Circuit Court of Appeals recognized in *Comer v. Micor, Inc et. al.*, 436 F.3d 1098 (2006), the Supreme Court has found: "[The] **duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.**" *Comer at 1100*, citing *Shearson/American Express Inc. V. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) and *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481. Therefore, despite Defendant's assertion, the law favors arbitration, and there is no bar to enforcing arbitration agreements in ERISA cases.

II. DEFENDANT LIBERTY HAS RAISED NO ARGUMENT TO AVOID THE CONCLUSION THAT AS AN ADMITTED AGENT OF PROVIDIAN, LIBERTY IS BOUND BY THE ARBITRATION PROVISION IN THE HIRING AGREEMENT.

The language of the hiring agreement and Plaintiff's argument has been set out in our original memorandum supporting the motion. However, Defendant raises concerns that do not directly relate to whether or not it can be bound by the language in the hiring agreement. Importantly, Defendant attempts to argue that an ERISA dispute should not be arbitrated. But, the

1 Supreme Court has stated otherwise, and holds, as noted above, that arbitration is a strongly favored
 2 dispute resolution mechanism, and is certainly applicable to disputes arising under federal statutes.

3 Defendant attempts to distinguish the *Comer* case and other federal authority cited by
 4 Plaintiff by arguing these cases only permit arbitration, and do not require it. *Defendant's Response*
 5 at 6:3-7:10. This is certainly helpful to Plaintiff's case, and the Courts agree that determining
 6 whether or not a non-signatory can be bound by an arbitration clause depends on applicable contract
 7 or agency principles. Here, Liberty admits it was Providian's agent for handling disability claims.
 8 As an agent, regardless of the ultimate rules to be followed in arbitration, Liberty can and should be
 9 bound. That Liberty claims arbitration will deprive it of ERISA given rights does not fit into the
 10 equation, as we have already briefed.

11 Defendant's only way to avoid application of the arbitration clause was articulated by the
 12 U.S. Supreme Court in *Shearson*:

13 The Arbitration Act thus establishes a "federal policy favoring arbitration requiring
 14 that we rigorously enforce agreements to arbitrate. The duty to enforce arbitration
 15 agreements is not diminished when a party bound by an agreement raises a claim
 16 founded on statutory rights . . . Absent a well-founded claim that an arbitration
 17 agreement resulted from the sort of fraud or excessive economic power that "would
 18 provide for grounds 'for the revocation of any contract,'" the Arbitration Act
 19 "provides no basis for disfavoring agreements to arbitrate statutory claims by
 20 skewing the otherwise hospitable inquiry into arbitrability." *Ibid*.

21 **The Arbitration Act, standing alone, therefore mandates enforcement of**
 22 **agreements to arbitrate statutory claims.** Like any statutory directive, the
 23 Arbitration Act's mandate may be overridden by contrary congressional command.
 24 The burden is on the party opposing arbitration, however, to show that Congress
 25 intended to preclude a waiver of judicial remedies for statutory rights at issue. If
 Congress did intend to limit or prohibit waiver of a judicial forum for a particular
 claim, such an intent will be deducible from [the statute's] text or legislative history,"

26 PLAINTIFF'S REPLY SUPPORTING
 27 MOTION TO COMPEL ARBITRATION - 3

KRAFCHICK LAW FIRM
 2701 First Avenue, Suite 340
 Seattle, Washington 98121
 (206) 374-7370 Fax (206) 374-7377

KRAFCHICK LAW FIRM

By: ss/Steven P. Krafchick
Steven P. Krafchick, WSBA #13542
Attorney for Plaintiff
Admitted Pro Hac Vice
Krafchick Law Firm
2701 First Avenue, Suite 340
Seattle, WA 98121
T: 206.374.7370 F: 206.374.7377
Email: klf@krafchick.com

PLAINTIFF'S REPLY SUPPORTING
MOTION TO COMPEL ARBITRATION - 4

KRAFCHICK LAW FIRM
2701 First Avenue, Suite 340
Seattle, Washington 98121
(206) 374-7370 Fax (206) 374-7377